S.B. Civil Misc. Appeal No.1425/2005

Mool Chand.
vs.
Kanwar Lal.

Date : 24.7.2006

HON'BLE MR. PRAKASH TATIA, J.

Mr. AK Rajvanshy, for the appellant.
Mr. Manoj Bhandari, for the respondent.

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Heard learned counsel for the parties.

The present appeal is directed against the order 20.10.2005 by which the first appellate court after setting aside the judgment and decree of the trial court dated 27.10.2004 remanded the matter back to the trial court for deciding the suit itself afresh. The first appellate court also framed three additional issues for which the first appellate court granted permission to lead evidence.

Learned counsel for the respondent has raised a preliminary objection that the appeal of the appellant is not maintainable as the appellate court has framed the issues and thereafter remanded the matter back to the trial court, therefore, the order under challenge is under Order 41 Rule 25 CPC. As per Order 43 Rule 1(u) CPC, appeal lies against the orders which have been passed under Rules 23 and 23A of Order 41 CPC only.

I have considered the arguments of learned counsel for the parties on preliminary objection.

It is clear from the reasons given in the decision in S.B. Civil Misc. Appeal No.342/2003 decided today, that the appellate court in case set aside the judgment and decree of the trial court and remands the matter to the trial court for deciding the suit afresh on merits of all issues, then the order of remand is not under Order 41 Rule 25 CPC but it is under Order 41 Rule 23A CPC.

The preliminary objection raised by learned counsel for the respondent is accordingly rejected.

On merits, learned counsel for the appellant submitted that the court below has set aside the findings recorded by the trial court on various issues merely on the ground that in the opinion of the appellate court, the trial court did not frame one issue properly and should have framed two more issues. It is also submitted that even if all the issues framed by the first appellate court except the issue about non-disclosure of cause of action, are decided in favour of the respondent/defendant, even then the finding of the trial court on the issue of personal bonafide necessity of the plaintiff is not affected. It is also submitted that even those issues which have been framed by the first appellate court are decided by the trial court against the appellant, the first appellate court seized with the regular first appeal can very well re-examine the

findings on the issues recorded by the trial court on new issues in the same pending appeal and for that purpose, proper procedure was to remit the matter under Order 41 Rule 25 CPC for obtaining decision of the trial court on fresh issues.

I have considered the submissions of learned counsel for the parties and perused the facts of the case.

It appears from the facts of the case that the plaintiff's suit was decreed by the trial court on various grounds which are independent grounds. The first appellate court found that one of the issue framed by the trial court was vague and not fulfilling the requirement for passing the decree for eviction of tenant under Rajasthan Premises (Control of Rent and Eviction) Act, therefore, recast the issue. So far as recasting of issue is concerned, that was done by the first appellate court rightly because of the reason that by this, the first appellate court would be in a position to decide the appeal properly and will be able to do justice to the parties. Because of vagueness in the issue, in the facts of this case, party particularly the defendant are likely to be prejudiced, therefore, framing of the issue by the first appellate court on the question of non-user of the premises for last six months by the tenant/defendant without any reasonable or probable cause was proper.

So far as non-framing of the issue of change of user by the defendant is concerned, admittedly, no such issue was

framed by the trial court and, therefore, the first appellate court rightly framed the issue about non-user.

So far as issue about non-disclosure of cause of action is concerned, after going through the pleadings in para no.18 of the written statement as well as in application under Order 7 Rule 11 CPC, this Court is of the view that that issue cannot survive after amendment of the issue about non-user of the premises by the defendant. Otherwise also, in application under Order 7 Rule 11 CPC, no ground is made out for the suit being barred by non-disclosing of cause of action, therefore, the issue about the non-disclosure of cause of action deserves to be set aside and is hereby set aside.

Even when the appellate court framed two issues and has quoted in the order, the order of remand in suit on all issues for retrial is absolutely contrary to law and the order cannot be justified by any stretch of imagination. Because of non-framing of issues on other question of facts which have nothing to do with the merits of the other issues, the decision of the other issues cannot be set aside unless the decision has connection and bearing upon the findings on new issues.

In view of the above discussion, this appeal is partly allowed, the order of the first appellate court dated 20.10.2005 is set aside so far as setting aside of judgment and decree of the trial court is concerned. In view of the reasons mentioned above, the matter is remitted to the

trial court for deciding two issues framed as mentioned above in this order after recording evidence of parties by the trial court. The trial court shall decide both the issues within a period of three months from the date of receipt of the record and copy of this order and shall sent the findings to the first appellate court. Record be sent forthwith to the court below.

Both the parties are directed to remain present in Court before the trial court on 23.8.2006.

(PRAKASH TATIA), J.

S.Phophaliya